MICHIGAN SUPREME COURT

PUBLIC HEARING
SEPTEMBER 26, 2002

JUSTICE CORRIGAN: Good morning and welcome to the Michigan Supreme Court public hearing here in Grand Rapids during the State Bar and Judicial Convention that's going on this week. I am here first to call on the president of our State Bar, Mr. Bruce Neckers.

MR. NECKERS: Thank you, Justice Corrigan, may it please the Court. It's my distinct privilege and pleasure to welcome you to my home town, the City of Grand Rapids, and to tell you that we are distinctly proud of our city. We are distinctly proud of the weather that we always produce when you come over here and as the president of the State Bar, let me tell you how much we appreciate the fact that you are holding public hearings like this one. That you are doing it all over Michigan. We are deeply appreciative of the fact that the administrative process has been opened up and that you are holding these hearings so that lawyers and citizens can be heard on the very important administrative matters. And as a personal note, since this is probably the last time that I will be able to address you as the president of the Bar, I want to tell you how much I have appreciated the opportunity to interact individually with each of you and especially to those of you who were responsible for giving us the opportunity to meet with you on a monthly basis and I'm speaking specifically of Chief Justice Corrigan and Justice Taylor. Those have been remarkably good opportunities to interact on issues that affect both of us and also to say that we have appreciated the opportunity to meet quarterly with you as an entire Court. It has been a good thing and as we sit here today and you're in more cramped quarters than you usually are, just let me say that as I've said to you before, the place where we do justice is holy ground and this is a holy place for us, for all of us in the justice system and we're just very happy that you're here with us this morning and thank you for all the opportunities that I have had to interact with you over the last year.

JUSTICE CORRIGAN: Thank you Mr. Neckers. On behalf of the Court we appreciate your welcome to Grand Rapids and your service as president of the State Bar of Michigan and I'll say on my own behalf and on behalf of the Court that you have served the profession in its proudest traditions. It has been an honor and a privilege to work with you. Thank you. I would like to now call on Chief Judge George Buth to welcome us.

JUDGE BUTH: Good morning Chief Justice Corrigan and Justices. I welcome you to Grand Rapids and Kent County on behalf of the courts and the judges of this county. It has been a long time since I've appeared in front of the Supreme Court way

back in the mid-'80s. It was always a pleasure to do that. It's an honor to have all of you here today for these hearings in Grand Rapids. And we appreciate as judges the contact we've had from you, Chief Justice Corrigan, and the other Justices, the interaction with the trial judges and the input you've sought from us and the interaction that we've had with the Court and it has really been very good and we are pleased with that and I'm sure it will continue. So again, I welcome you on behalf of the courts and the judges of Kent County.

JUSTICE CORRIGAN: Thank you Chief Judge Buth and let me just observe, all of us were on the Court of Appeals who now serve on the Supreme Court and we spent many hours in this particular courtroom, I know, as judges of the Court of Appeals but it is a particular pleasure to drive down the street to get to the courthouse and to see the beautiful Kent County Courthouse in which you and your colleagues are presiding. So thank you, and we're glad to be here in Grand Rapids this morning. And now may I call on the Honorable Patrick Bowler who I believe is to welcome the Court on behalf of the Grand Rapids Bar Association.

JUDGE BOWLER: Yes, good morning Justice Corrigan, good morning Justices. On behalf of the Grand Rapids Bar Association we welcome you. The last time I served before the Supreme Court was quite awhile ago. I argued a murder case and the infamous year and a day rule case, some of you might remember. After that I was accused of acting too much like a trial attorney in my appearance before the Supreme Court. Today I'll probably be accused of acting too much like a trial judge. We do welcome you. If there is any concerns you have over the next couple of days, please contact me or Bruce. We will be very much at your service. And if you have any difficulties, I'm also the beeper judge tonight and tomorrow night so we can help you out there too. We're thinking of having a pre-posted bond plan here for everybody. Welcome to Grand Rapids. It's a beautiful day. And if you can get to the courthouse, if any of you have any free time and you want to look around, please contact us.

JUSTICE CORRIGAN: We will. Thank you, Judge Bowler, we're glad to be here. This morning we have a number of persons who have signed up to speak. The rules of this particular proceeding are that each person may have 3 minutes to speak and we will not interrupt you during that time period. And we ask you to limit your time as much as possible. There are a large number of speakers. I must leave the proceedings at 11:00. They will be continued and Justice Cavanagh will preside and the hearing will end promptly at 11:30 so we welcome you and without further ado let me call Item 1. The first speaker is Richard Victor. Mr. Victor.

<u>Item 1: File 1999-10 - MRE 703 AND 1101</u>

MR. VICTOR: Good morning Justice Corrigan and Justices. At this time I would like to make a brief presentation as a family law attorney and then in the limited time I have dispel some of the inaccuracies that appear to have been presented to you in other material. This pertains to the amendment to Michigan Rule of Evidence 703. The reality of cases which are filed and cases which are actually tried show a very small percentage of family law cases going to trial. For an example, in Oakland County, which is the primary county of my practice for the year 2001, there were 8,012 divorce actions filed. 59 of them went to trial, so that's 3/4 of 1% of the cases wind up going to trial. Now I can tell you from personal experience that many cases that otherwise would have had to go to trial were settled or resolved following the psychologist's report. Invariably both attorneys in family law cases get telephone calls from their clients alleging their own facts and things that occur. Attorneys then call each other accusing each other of what their client supposedly did. We lawyers know one side of the story. We present to the Court that we need to hear the whole side of the story. The utilization of the psychologist's report is useful to us as a tool to settle cases and help families. We need to know what the truth of a matter is. I can't tell you how many times in 30 years that I have practiced that I have utilized the psychologist's report to counsel my own clients in resolution of their problems that they're going through. The emotional turmoil of divorce is well known by everybody. But oftentimes we need to know the whole picture and the whole story. If we limit psychologists when they are doing an independent investigation, and remember they are 706 experts appointed by the court as the court's expert, allegiance only to the judge and to the children, they are the only ones who are allowed to give opinions because unless you are able to interview all of the parties and children involved, the licensing regulations don't even allow them to make a recommendation on custody. We need to exempt 706 experts so that they can talk to teachers, talk to family members, talk to neighbors. So that we don't have to call all of those people into court as a witness, inconveniencing the citizens and public and of course making them know that they are going to be subpoenaed so they won't even talk. We need the whole story even if that means getting some hearsay into a psychologist's report which the psychologist can then be cross-examined. With all due respect to other areas of law, and I don't mean to demean it, but if you have a contract case or a real estate case or a personal injury case, you're going to be dealing with possibly a business or an individual. But when you have a family law case you potentially have the capacity to deal with generations. We need more help with respect to resolving these cases so utilizing the psychologist's ability to be able to talk to other people without the necessity of having those people be brought into court if the case had to go court is essential for our ability to be able to handle cases. And to dispel a few inaccuracies that have been placed before you. Number one, that both sides are going to hire their own experts--

JUSTICE CORRIGAN: Mr. Victor your time is up. The red light is on. I want to see if the Justices have any questions for you.

JUSTICE WEAVER: I'd like to hear the end of what he has to say.

MR. VICTOR: Very briefly then, if both sides do not hire their own experts as independent experts, they can't. The analysis to business appraisers is totally flawed. A business appraiser can be hired to review books and records and render an opinion. If you have an adversary expert as Judge Giovanni in his notes to you indicated, they can only testify by Michigan law as to what they're qualified for and they can only be qualified as to what they reviewed in a court. They cannot provide a recommendation regarding custody or parenting time. And the court can then give the weight to whatever they're going to say. We have to exempt 706 witnesses who are the court's witnesses from this amendment.

JUSTICE TAYLOR: Mr. Victor, you probably are acquainted with the fact that there are several alternative proposals for 703 and there is one that has two sections, a and b. Are you acquainted with how it's been described in the information you have?

MR. VICTOR: Alternative B?

JUSTICE TAYLOR: Right. Why wouldn't the one that says if the court finds that the proponent of an expert opinion or inference has shown that there is no good faith basis for contesting the truth or accuracy as best (inaudible) admissible or unadmitted facts or data in a particular case, the court may admit an expert opinion or inference based on those facts or data. Now let me just give you a hypothetical. You mention the school teacher who might have some insights as to matters concerning the children in a divorce. Let's suppose she says something that is of a factual basis, you know, the father always brings the child to school and always attends the parent-teacher conferences. The mother doesn't. If the expert were attempting to get that information in, and the other side contested the hearsay nature of it, wouldn't this provide an avenue of extrication for the trial judge who wanted to get that information in.

MR. VICTOR: That is correct and it would. But you'd have to have a hearing with respect to the witnesses to put into question whether or not there is a good faith exception pertaining to whether or not the woman did come to the school to bring the children. What we're suggesting, and you're 100% on point. If the independent psychologist in their expert opinion has spoken to somebody and they've received inaccurate statements or they have reported inaccurate statements, you are able to call the witness into court to say this was not said, this was not done, and that would have significant weight on the credibility of the expert. My point to you is over 30 years--

JUSTICE TAYLOR: I'm not contesting anything you're saying. I just want to make sure I understand why this alternative rule wouldn't take care of the problem you raise. The expert can get the hearsay in if the court concludes it's accurate. And if the other side claims it isn't accurate then the judge has to determine what to do and that might, of course in the case I was just mentioning, asking the teacher.

MR. VICTOR: It requires a hearing.

JUSTICE TAYLOR: Yes. But why is that such a bad outcome.

MR. VICTOR: It's not necessarily a bad outcome to resolve that dispute because you are correct, it's going to require a hearing either way. What I'm suggesting though, is that if the psychologists are barred from being able to talk to these third parties and getting the totality of circumstances--

JUSTICE TAYLOR: Why are they barred.

MR. VICTOR: Well if they are barred knowing they can't utilize any of the information that they have gleaned from those people as part of their recommendation unless they are being called in as witnesses, the people that they're going to talk to--

JUSTICE TAYLOR: I'm confused. Wouldn't the expert psychologist go talk to the teacher in our hypothetical, and they he put in his report what the teacher said. Now he's called as your witness and you say I'd like to present him and I'd like to have him give testimony. Now he's probably going to give testimony about this as opposed to having his report be admitted, right.

MR. VICTOR: Right. The psychologist will. But the teacher will know in advance that if she is going to talk to the psychologist, nothing that she can say to the psychologist--and the psychologist will know in advance, that the teacher will have to be a witness

JUSTICE TAYLOR: No, no, only if the other side contests it.

MR. VICTOR: Yeah but how many times, and I believe there will be other witnesses explain this, how many times will there not be a contest if the report goes against your client.

JUSTICE TAYLOR: I think if the court decides they're going to assess costs to the person who frivolously causes the teacher to have to be brought in.

MR. VICTOR: You're correct and I've read that before in other opinions. The reality is that we don't really receive costs in these kinds of cases.

JUSTICE TAYLOR: You might under this kind of rule.

MR. VICTOR: We might. What I'm saying though is if it's not broke don't try to fix it.

JUSTICE TAYLOR: (inaudible). That's the reason why we have this rule.

MR. VICTOR: And I believe, and in some areas of law, that it is not appropriate to be able to allow that hearsay in. But I believe that family law cases should be exempted because of the necessity that we need that psychologists be able to talk to everybody involved in the family without their knowledge that they're going to be subpoenaed in, inconvenienced into being witnesses, or the information cannot be used. I understand the dilemma and the problem and oftentimes on paper it looks one way and I agree with you, Justice Taylor, you know that I do. Except in reality that's not what happens. 3/4 of 1% of the cases go to trial. We use these reports, we use the psychologists--

JUSTICE TAYLOR: Why wouldn't the report be prepared just like it is now and you'd still have the use of that report and the worst that would happen, it seems to me, is that there might be a bad patch or two in getting all this information before the court and if the other side knows that indeed the teacher is going to come in and testify that the father always attends the parent-teacher conferences and brings the child to school every day, and that we're going to be assessed costs for this, I suspect that if we make them prove that up, it won't take very long before the words gets around that if you encounter Judge X you better have a good reason to contest the good faith or accuracy of this or they'll make you pay.

MR. VICTOR: Well unfortunately we've had rules, MCR 2.114, on the books forever. It's not as enforced as it probably should be.

JUSTICE TAYLOR: Of course that depends on how much time the trial judge wants to waste on this. It seems to me that the trial judge has a great incentive to get everybody serious about let's not contest what really isn't at issue and what isn't really contested.

MR. VICTOR: But by what we have right now, the psychologists are able to talk to all of the third party people--

JUSTICE TAYLOR: They still can--

MR. VICTOR: They still can but they're limited knowing that unless those people are going to be brought into court, if they have to testify they cannot testify to anything that was said.

JUSTICE MARKMAN: Mr. Victor, do you not see some potential, in fact don't you see some actual abuses in the status quo.

MR. VICTOR: There are abuses to the extent that possibly hearsay could get in.

JUSTICE YOUNG: You said possibly?

MR. VICTOR: Well, when it's being used that you're going to be able to talk to somebody that is

JUSTICE YOUNG: That's the whole purpose of having a (inaudible) expert so you get all the--

MR. VICTOR: Right, but you have the ability to call like the teacher and bring them in yourself if it's against your client's position and in fact it's untrue so you can dispel it. So when I said possible, of course that is hearsay, but it can be contradicted by the witness themselves. The point of the matter is that we've found that during these discoveries, the amount of information that they get from third parties is essential but it's small. It helps get the picture of what's happening with this family. They then use that in providing a recommendation to us as family law attorneys to sit down and counsel our clients. How many times do we tell our clients they need to seek help, they need to seek counseling. They need parent coordination to due with communication skills between the two of them because even though they will no longer be marriage partners they will be parent partners for the rest of their lives.

JUSTICE YOUNG: So your point is these psychological reports state an epiphany for warring parents. Now my question is, if you get a report what's the difference between getting the report and reviewing it with your client and having that witness get on the stand and repeat what's in the report.

MR. VICTOR: I suspect it would change the practice of how the psychologists are able to conduct their investigation.

JUSTICE YOUNG: I really don't understand why there is any fundamental

difference in the way a psychologist would approach the problem of developing an opinion based on this rule, either a or b.

MR. VICTOR: Well I would defer to Dr. Erard who is here from the Psychologists Association--

JUSTICE YOUNG: Tell me why it would affect--

MR. VICTOR: How it would affect the psychologists. Well I would suspect, in my opinion, it would affect in how they go about doing the report and the investigation and getting the information that they need to make their recommendation. I would suggest though that we do limit to the emotional stability of the parties and psychological issues that our court indicates is part of the Child Custody Act and the 12 factors. The psychologist does not have to give a report on issues that are not pertaining to their expertise. So they don't have to give a recommendation on all 12 factors. They can go through the factors and see which factors would have an impact on the emotional stability of a family, psychological problems the parties and the children have, and what can be done to help this family based on the totality of the information that they receive.

JUSTICE TAYLOR: I think what is stumping us is if that's all true and this rule wouldn't affect it one thing

MR. VICTOR: With the exception (inaudible)

JUSTICE TAYLOR: If the psychologist is going to sit down and try to dump out what is going on with this group of personalities, it's inconceivable to me that he says oh my gosh, now I've got hearsay problems. I think he's going to do his job and then the lawyer is going to say my gosh we've got a hearsay problem. And then he's going to say are we sure these things are true. Yeah, I think we are. Well then let's go with it. And if the other side makes us prove them all up, I'll bet you Judge Jones will order costs of a sizeable sort. But we've got to be right they're true.

JUSTICE CORRIGAN: I don't understand why the analogy isn't to what goes on with presentence reports and probation officers now in terms of the proposal because we're asking to test for accuracy. And I'm not aware in the analogy of a probation officer that the accuracy restraint that they have impedes their ability to report to the court. Or can you tell me why I'm off base on thinking that.

MR. VICTOR: I wouldn't be able to know anything other than my area of law but I understand the specifics that you're talking about. I just believe that the psychologists that I've spoken with in my experience practicing and utilizing the tools that

we have in the psychologists' reports, that they have been extremely helpful in providing a totality of information. I'm fearful that when people know that they're going to be subpoenaed or they're going to have to come in and testify if they're going to talk to anybody, that we will potentially limit information that is really necessary to help this.

JUSTICE TAYLOR: Isn't that a potential now. When the psychologist goes out to talk to our hypothetical school teacher she probably thinks gosh I may get called to testify. Today, doesn't she think that.

MR. VICTOR: She may think that, but with this rule there would be a certainty.

JUSTICE TAYLOR: Why.

MR. VICTOR: Because you cannot testify under this rule to anything that will not be already presented into evidence or will be presented into evidence after--

JUSTICE TAYLOR: No, no. You're forgetting about the second part of the rule. The second part of the rule says the other side has to say I don't want those statements from the teacher coming in because I don't think they're accurate.

MR. VICTOR: I presuppose that that's going to happen anytime a report is going to come out against the client.

JUSTICE TAYLOR: Then I think that's a problem for the trial court to discipline this kind of thing. If this is a no penalty frivolous objection there will be a lot of them. But if there is a sizeable penalty. Maybe the mother wants to say well he takes them to school but the reason is he's got a car.

MR. VICTOR: Your Honor, with all due respect, I agree with you 110% except in reality in the world out there the judges and the courts are not exercising the discretion that they have--

JUSTICE TAYLOR: But it would be very much in their interests to move their dockets, to make sure that the issues get narrowed and that we're not quibbling about things that everybody agrees about.

MR. VICTOR: Well it's family law. Unfortunately there are, like I said, 3 sides to every story. There oftentimes, very simply put, a good faith effort made to dispel what the other person is saying. And judges in these cases who are attempting to compromise these situations, because these are very difficult cases and they don't even

want to deal with them, they are not coming down with sanctions or costs. They're not.

JUSTICE MARKMAN: Mr. Victor, would you be better disposed toward a proposal of the sort if there were a more explicit sanction.

MR. VICTOR: Well if it's going to explain and express an urgency in order to expedite these matters to get to the truth of the matter and that the court shall sanction. Well, of course we really have that MCR 2.114 and of course it's not being utilized as it should be, yes I would be in favor of that.

JUSTICE MARKMAN: If there were an effective sanction and I don't know if we could construct that or not, but in principle if there were an effective sanction would you support this proposal in principle.

MR. VICTOR: I would support the proposal in principle, yes I would.

JUSTICE TAYLOR: Do you think that would be the case with most distinguished family law practitioners such as you are.

MR. VICTOR: I think that we still feel that the utilization of the report is essential. If in fact the practice is is that this will help us get to the truth of the matter without people utilizing the system to skirt the truth then yeah, that's what we're all here for. Whether that will happen or not I'm not sure.

JUSTICE KELLY: Your position is that the way the rule is working right now is working well.

MR. VICTOR: Yes, I believe the rule is working well. I think the proof of that is in the pudding. If you have 8,000 divorce cases filed and 59 going to trial, most of them are settled. Many of them have child custody issues before them. Not every one of them goes to a psychologist. The information that each side hires their own is wrong. That's just not what happens. You may hire one to look at the report. You can only have one that is going to come in as a 706 expert to provide a recommendation and that person helps us settle cases doing what they're doing now and what they have been doing.

JUSTICE CORRIGAN: When you represent that there's only that one expert, is that on the basis of your practice in Oakland County or is that a representation with the entire state of Michigan in family law cases.

MR. VICTOR: Well it is the law if you're (inaudible) to the ability of a psychologist based on their own licensing regulations, you cannot as a psychologist make

a recommendation regarding custody or parenting time unless you have seen all of the parties involved. Invariably if you don't like the 706 you

JUSTICE CORRIGAN: Okay but the law requires, what I'm asking you, so the notion that some of us have that there are these competing experts out there is a false notion.

MR. VICTOR: Well okay, you ask a great question. I tried a case in Genesee County and the judge was allowing a woman's therapist to come in and testify that she should have custody. The therapist never saw my client, the man. And I had to raise my objection and I had to argue to the court and convince the court that they could not take the recommendation. And I would suspect that some people would have allowed that in, inappropriately and incorrectly.

JUSTICE CORRIGAN: All right. Any other questions, Justices. We have 9 other people to hear from. Thank you Mr. Victor, thanks for appearing today. Dr. Robert Erard, Michigan Psychological Association.

MR. ERARD: Chief Justice Corrigan, Justices, on behalf of the Michigan Psychological Association and also the Michigan Society of Forensic Psychologists, I would like to thank the Court for the opportunity to address the proposed amendments to MRE 703 and 1101. The central problem with the proposed changes to MRE 703 is that they fail to take into account that not all experts are spoon fed the bases of their opinions from the work product and discovery of the attorney who hired them. This is true not only in family court and probate court but also in personal injury and employment law on the civil side and in psychiatric examinations under MCL 768 on the criminal side. In all these independent professional discovery is often conducted by investigative experts following their own professional canons. Opinions based on such independent investigations will inevitably rely on some out of court statements which could reasonably be challenged in good faith on however trivial a basis by an unfriendly advocate. Neither alternative amendment to MRE 703 provides the court with adequate discretion to determine whether any of these discrepancies is of sufficient weight and substance to serve as a reasonable basis for barring the expert's testimony in its entirety. With regard to 1101, not only are the proposed amendments grossly unworkable but they also vitiate the very objective behind the proposals to change Rule 703. Even setting aside the completely unrealistic administrative and financial burdens this proposal would place on the diverse Friend of the Court systems throughout the state, the proposed rule changes would inevitably permit Friend of the Court opinions and recommendations to be received into evidence without even an opportunity for access to, much less cross-examination of, the underlying evidence. Just as attorneys and judges are coming to terms with the Michigan Court of Appeals' clear signal in Malloy that the same due process rules and procedures

apply in family court as elsewhere, and as secret evidence is an anathema in family court just as everywhere else, the proposed changes to MRE 1101 would push daily courts back in the opposite direction by having court personnel produce, manage and protect from disclosure their own evidence. Under MRE 702 the court's central responsibility with respect to experts is to determine whether the preferred testimony is likely to be helpful to the trier of fact in understanding the evidence and determining the facts. If an expert's opinion is erected on a foundation that is grossly inconsistent with the admitted evidence that opinion is clearly going to fail the test of relevance. Thus judges are already mandated under MRE 702 to perform a significant gate keeping function with regard to the foundations of experts' testimony before 703 is even considered. Such gate keeping responsibilities go to the very heart of what it means to be a judge. As both federal and Michigan courts are in the process of clarifying and expanding the gate keeping responsibilities of judges under MRE 702, a proposal to relieve them of what is essentially the same burden under MRE 703 can hardly be good administrative policy or good jurisprudence. By making the evidentiary process go through more mechanistic and more cumbersome, the proposed amendments advance neither the interests of due process nor the efficient administration of justice. We believe that improved judicial education with regard to the use of experts and the Rules of Evidence and strict appellate review when judges abuse their discretion are the best ways to insure the reliability and relevance of expert opinions.

JUSTICE YOUNG: Doctor, it has been suggested that the proposed rule change will work some sort of change in the way that psychologists gather information relevant to the development of an opinion. Tell me how the process of getting hearsay or other evidence contained within the (inaudible) predicate for an opinion will affect a psychologist's effort to find out psychologically what's going on.

MR. ERARD: Well Justice Young, at first I don't think it will have much impact at all because psychologists will try to do what they're supposed to do. They'll try to contact collateral sources. They'll try to do what you call quite properly a port man tow (?) or omnibus view of the whole case and present it in a way that hopefully the parties can settle over. And that will involve a great deal of hearsay for sure.

JUSTICE YOUNG: It always has.

MR. ERARD: It always has. What will happen is as they start getting experienced with being challenged in court they're going to change their way of doing things.

JUSTICE YOUNG: They might, for example, be very careful about their notes when they talk to fact witnesses.

MR. ERARD: Actually I think they'll stop talking to collateral sources altogether for a very simple reason. Any time that I have been in a trial and I've been in quite a number of them in many counties around this state, the fight is always over the facts. It turns out that not all the facts are equally essential to the opinion. Some facts are put in really by way of background or they're little historical points, they're almost atmospheric. They are in no way essential to the opinion. But you put them into the report so that people can see how you are looking at the case as a whole and giving the flavor of what is really going on in this family. When you write a report that way it is very useful for settlement purposes. I think it is very useful in giving the judge an overall view of the case as well and in saving the court from going through all kinds of trivia that it really doesn't need to be involved with. But if the rules encourage challenge on every fact no matter how trivial, let me tell you there isn't a report that's every been written in the state of Michigan that is not open to such challenge. There are always disputes about the facts.

JUSTICE YOUNG: So you believe one of the effects will be to eliminate the trivial coloring background facts.

MR. ERARD: Well I think that in some way understates the problem Justice Young. Really it's going to make it impossible to get into the facts. All we'll really be able to talk about is what the parties told us about themselves and what we saw maybe in the psychological testing. Certainly anything that we learn from the child is not going to be admissible. That's immediately challengeable because that's not going to be in evidence. But this isn't only in family law either. This is going to be everywhere. Whenever there are facts that have been gathered outside the courtroom there's always plenty of room for challenge because think about how MRE 703 is written right now. The judge has the discretion to say hey, this doesn't fit with the evidence and I'm going to exclude it. But it's not essential, and the word "essential" is in the language right now and that's what's disappearing. If it's not essential to the case, if it's not essential to the opinion then that shouldn't be enough to exclude the expert. But what's going to happen in every case is there's going to be some fight over the facts and it's going to lead to all kinds of motions in limine, all kinds of efforts to get rid of the expert, and nobody will be able to predict in advance what the strength of that expert is. Generally predicting in advance what the strength of the expert is is what leads to settlement of the case. Hey this is a strong expert opinion, I advise you to settle. Well no, what are you talking about, you could challenge it on a hundred trivial factual discrepancies and possibly get it thrown out, let's roll the dice. That's what is really going to start happening. Think about cases that have come before the Supreme Court where the issue is about matters of law. Think about the factual statements that you read. How often do plaintiff and defendant agree in their statement of facts even closely. And this is about a matter of law. In the lower court issues about facts are constantly in dispute. There is no statement of facts that both sides

will stipulate to ever, and so to get back to the question that Mr. Victor was trying to answer--what about sanctions, will sanctions make a difference. The judge is in no position to sanction because there will always be good faith disputes about the facts and there's no reason there shouldn't be.

JUSTICE TAYLOR: Take the hypothetical I raised where part of the psychologist's report is that the father drops the children off at school every morning and goes to parent-teacher conferences. And that's true, let us say. And the other side decides to contest it. It seems to me that the incentives for a trial court are to try to eliminate that kind of frivolous objection and the way you do that is you assess a penalty to the party that makes the court go through the hoops of proving up that yes indeed he drops them off at school and goes to parent-teacher conferences. Why isn't that the way the court will be incentivized to handle this. It may not be the case now but maybe we haven't supplied sufficient incentives. See, the problem here, doctor, is for 800 years in our system of evidence we found hearsay to produce injustice and that's the problem.

MR. ERARD: Right, and I agree that hearsay can produce injustice. I think that that is not as big a problem as it might appear because what happens--

JUSTICE YOUNG: Why do you believe that. Frankly the rule as it's being administered is a license to bring wholesale hearsay that an advocate cannot get in in any other way except through the office of an expert witness. Any of us who have tried cases and used expert psychologists or experts of any sort know, especially people in your profession because you have such an omnibus method for collecting data anyway. So the perfect way of getting in coloring facts and background is to hire a psychologist or a psychiatrist. Why should we encourage that in a system where we have a rigorous attention to provable facts.

MR. ERARD: Justice Young, what really happens is that the psychologist who is shaky on the facts and is bringing unsubstantiated hearsay is going to be inconsistent with the actual--

JUSTICE YOUNG: Let's say that it's accurate hearsay. This witness says this is a bad father. That comes in through the expert.

MR. ERARD: First off a responsible expert would not place much weight on somebody saying this is a bad father because that's not really particularly relevant.

JUSTICE YOUNG: The whole family reports that this is a bad father.

MR. ERARD: Well, actually, they might get in under the exception to the

hearsay rule about personal reputation if we go that far but the hearsay that does not comport with the evidence, if it is essential to the expert's opinion, should be thrown out by the judge and perhaps the expert's whole opinion should be thrown out if it relies very heavily on such hearsay. My point is that the court needs to have discretion to decide what is a trivial objection to a minor factual discrepancy which cases are full of all the time, or whether it is really essential to the opinion that's being offered.

JUSTICE TAYLOR: Why wouldn't the suggested rule that I was talking to Mr. Victor about have that potential. Alternate B.

MR. ERARD: Well Justice Taylor, what happens under Alternate B is that we're going to have two trials in every case. We're going to have a trial that's held over motions in limine that could go on for days because experts' opinions are full of all kinds of challengeable facts. They're developing their own statement of facts which cannot perfectly anticipate what's going to come into evidence. And so all those discrepancies allow it to be open season on the expert before the expert even gets on the stand. There will always be good faith objections on the matter of facts because the parties never agree entirely on the facts much less agree also with the experts' version of the facts. The proper place to determine what the facts are and what the evidence is is in the course of the hearing itself. What's going to happen is--

JUSTICE TAYLOR: The current system far too often lends itself to no check of all the hearsay. There's hearsay on one side, there's hearsay on the other and the trial judge doesn't ever get that unraveled.

MR. ERARD: Well Justice Taylor your thinking--it seems that the judge wouldn't have discretion to determine what to include and what not too so we should take all discretion away and yet--

JUSTICE TAYLOR: No I'm saying the current system the lawyer stands up and says don't let this testimony in because there's hearsay in it, and the court I think under the current rule says well, you know, this is a domestic relations matter, let's take it for what it's worth and off we go and the hearsay all comes in. Now that's what happens. And that's a bad system.

MR. ERARD: It would be a bad system if it would stop there, Your Honor, but

JUSTICE YOUNG: Where is the check. Where is the judge, under the current rule in practice required to make that kind of searching analysis that this is a trivial matter, as you say is the critical issue, or that this is the kind of hearsay that really

does not warrant being admitted and therefore the opinion cannot rest on that bit of hearsay. Where in the current rule or practice is that kind of discretion being exercised in your experience.

MR. ERARD: All right, so under MRE 702 and 703 I believe judges are required to do it. You're asking when do they really do it.

JUSTICE YOUNG: In your experience how many times has a judge said whoa, the expert is going to testify about that bit of hearsay, of course not. How many times has that happened in your personal experience.

MR. ERARD: I would admit, Justice Young, that it is quite rare.

JUSTICE YOUNG: Have you ever fought about hearsay that you were concerned could not be admitted. You seem quite expert on the Rules of Evidence here.

MR. ERARD: I'm not usually particularly concerned about having hearsay admitted. However, I'm very careful about what hearsay I put in a report. Now what happens if an expert is not careful is he will have his legs shot out from under him on cross-examination because there is nothing more embarrassing to an expert than to say I'm basing my opinion on the following facts and it turns out that the evidence is completely discrepant with that in several essential particulars. What happens at that point is the expert loses all credibility and really doesn't get anywhere. That's when experts really fail.

JUSTICE YOUNG: Well the question I guess is should the jury be subject to the flow of the sewers and have it sponged off by cross-examination or should they not be exposed in the first place.

MR. ERARD: I think that there are many situations in which they should not be exposed in the first place but I think there are mechanisms in place already permitting that. If we're talking about we're moving away from family law and into general civil law I'm hearing, because we're talking about juries, first off experts should be deposed. They should be required to produce reports and the factual discrepancies should already be in the hand of the cross-examining attorney beforehand and at that point there is nothing under current MRE 703 to prevent a motion in limine that says Your Honor this expert is relying on all kinds of things which are inconsistent with the evidence as it will be admitted and I want this testimony excluded. Thank you Your Honors.

JUSTICE CORRIGAN: Thank you Mr. Erard. Carlo Martina, State Bar

Family Law Council.

MR. MARTINA: I'm speaking on behalf of the 22 elected members of the Family Law Council of the Michigan State Bar. I bring their greetings and thanks for being able to address this distinguished panel of jurists. Statistics show that almost half of all marriages in our society will end in divorce. Besides affecting the parties and their children, it indirectly affects countless other members of their families and the communities they interact with. Of paramount importance is what happens to the children. How will they be affected by this process, how will they be raised and by whom. This is not a trivial issue. A person can be a party to bringing a child into this world but that doesn't necessarily mean they have the skills, experience, desire or disposition to be the person charged with the primary responsibility of raising that child. They can be motivated by a number of reasons. Some are legitimate but some are motivated by the desire to punish the other party through the children, exert power and control beyond divorce, or for some it's simply the money. There are complex actions involved and emotions at play. These and other issues require experts' involvement. In most instances after the clients have had candid conversations with their counsel regarding the chances of custody the issue is decided in a quick amicable fashion. If the parties are unable to reach an agreement on custody the court provides procedural structures, including the use of experts, discovery and mediation, to allow the parties, through the litigation process, to reach their own decisions on this crucial issue. While proponents of the new amendment to MRE 703 speak in terms of needing to stem a wave of complex custody trials fraught with the time consuming complexity of the testimony of competing experts, statistics simply do not support that. Statewide in the year 2000 divorce statistics show that less than 1% of all divorce cases went to trial. Those statistics held true in 2001 for Wayne and Oakland Counties. The real reason I believe we're seeing expanded use of experts in controverted custody cases is in part because of an evolution of the roles and responsibilities for mothers and fathers of children of this state. Increasingly for a variety of reasons mothers no longer take on all the responsibilities of parenting. Fathers have an increasing share of those duties. The practical result is increasing numbers of cases where traditional alternating parenting weekends, alternating holiday visitation done with such prevalence 10-15 years ago is no longer acceptable to either party. The complex issue of who will ultimately bear primary responsibility for the child's custody is genuinely at issue. The present system using MRE 703 has been doing a remarkable job accomplishing this task. In some instances the parties and the court choose one expert for the job. In some, one or both of the parties hire an expert to assist the trier of fact. The court still must listen to the testimony of the parties, the extended family members and other lay witnesses. As the rule presently exists the court can on its own initiative require underlying facts or data be in evidence. Opposing counsel can move to limit or strike such outside sources of evidence or they can subpoena those sources of data relied upon by an opponent's expert felt to be misleading, incorrect or simply misconstrued by the expert.

As the factual foundation crumbles so does the expert's credibility. Thus the record may be protected as it is now in a variety of ways. To require in every case that all underlying facts for an expert opinion be in evidence is overkill and it will have a chilling effect on witnesses. If teachers know you may have to be there just to be able to talk to this expert, day care workers, doctors, I'm telling you, they'll run like lights turn on, like this (snaps fingers). They'll just run for the woods because they don't want to be in that position. What will the public say then when they realize with increasing frequency that their childrens' teachers and school administrators, day care workers and physicians, aren't at work because the court requires their direct involvement at trial whether or not there was any reason to question the validity of statements and their use by an expert in a divorce trial. With this new amendment not only to litigants pay dearly, so will all of society. (inaudible) suggested in 1101 give no relief. Friend of the Court personnel in the counties in which I practice, Wayne, Oakland, Macomb, Washtenaw and Livingston, are stretched beyond belief. They're short-staffed, overworked. They're doing Herculean tasks with the responsibilities they now have but to think that this additional responsibility can be dropped in their laps in every case in which an expert on custody is required is, I believe, unrealistic. The result, absent monumental increases in Friend of the Court staffing, will be expert opinions expressing only one view for the court to consider based on incomplete or insufficient data which the Friend of the Court personnel have no time to chase down or include information they didn't have time to authenticate and is now simply swept into evidence because it's mentioned in a Friend of the Court report. And if they don't have the time to talk to all the relevant witnesses, the Friend of the Court doesn't acquire all the relevant data, the eventual expert's report will be lacking in credible foundation, something which all these changes were supposedly to help avoid. I can't speak for other sections of the Bar. I speak only on behalf of the Family Law Council and the family law practitioners located throughout the state which the Council represents. We are deeply concerned about the adverse effects of this proposed amendment that MRE 703 would have on family and custody issues which must be resolved by practitioners in the family law section. We ask that this amendment proposed not be adopted. If this body decides it needs to otherwise address this rule, that family law be exempt from its application.

JUSTICE TAYLOR: Is it the position of the Family Law Council that unlimited hearsay is needed to practice domestic relations law.

MR. MARTINA: No, it's not. And quite candidly, if it was convenient and financially practical to have every teacher, every social worker, every person who had any contact, come before the court and testify--

JUSTICE TAYLOR: Why do you say this. Have you read Proposal B.

MR. MARTINA: Of course I have.

JUSTICE TAYLOR: Why would that teacher have to come in if what the teacher has said is agreed to be accurate.

MR. MARTINA: Because, Your Honor, it's so rare, with all due respect--

JUSTICE YOUNG: You think the mendacity of lawyers (inaudible).

MR. MARTINA: It wasn't so much that. It's just rare that the issues are so black and white as you suggested in your analogies to Dr. Erard and Mr. Victor. Oftentimes, Your Honor--

JUSTICE TAYLOR: Unless the expert is loading it up with a lot of subjective information, this is a bad father says the neighbor. But if the expert is saying the neighbor says that the father plays with the child quite frequently in the backyard, that they go fishing on occasional weekends, and so on, those are all sort of facts. Whatever the heated issue about 1101, these Friend of the Court requirements come from a statute. They don't come from this Court.

MR. MARTINA: But the present rules actually deal with that very issue. If I see something in an expert's report where they're saying this neighbor said this, that or the other, or this teacher said this, that or the other, and it's the opponent's expert and I know that he's misconstruing that, I'll subpoena that person. I'll bring him in.

JUSTICE TAYLOR: Why would a teacher think under this rule she is anymore likely to be called as a witness than she would under the current system.

MR. MARTINA: I'll be frank with you. I can realistically see when a person doesn't want that kind of information coming in, telling these witnesses, by the way I just hope you realize that if you're going to talk to this expert, if you're going to get involved in this case, the court has the right to require all of you to show up.

JUSTICE TAYLOR: I'll be frank with you. I can realistically see when a person doesn't want that kind of information coming in, telling these witnesses, by the way I just hope you realize that if you're going to talk to this expert, if you're going to get involved in this case, the court has the right to require all of you to show up.

JUSTICE TAYLOR: They do now.

MR. MARTINA: But now, Your Honor, they know that the vast majority

of times they don't have to come. You've got to figure in any given class that there might be half a dozen kids whose parents are getting divorced. That's reality. And if the simple fact of the matter is all these teachers have to be under subpoena they might not ultimately have to come, but if they have to be under subpoena, day care workers under subpoena, doctors under subpoena, just in case there's a dispute, do you think they're going to want to get involved. I don't think so. If I was a teacher, I'll be honest with you, as much as I might care about Johnnie or Susie in my classroom, I'd be much more concerned about being in class tomorrow morning because the rest of the class is going to need me there and I would probably be expecting to say to the expert I'd love to help you but God forbid, if I have to be drug into this thing I'm going to miss another day of school. I've already missed a half a dozen this year.

JUSTICE CORRIGAN: Could I understand something. Why is this rule going to increase the number of trials in family law cases. You said there were only 1% of those cases which are an astronomical number of filings.

MR. MARTINA: I don't know if it will.

JUSTICE CORRIGAN: So why do we assume that teachers are going to be subpoenaed across Michigan. Why is the rule going to have a cause and effect relationship.

MR. MARTINA: I'll be frank with you. If I had a trial coming up next Friday on a case like this, typically get the report a week, week and a half in advance, and I don't know what the judge is going to decide, you know something, I'm going to have everybody under subpoena because I'm not going to wait until Thursday morning or Friday morning the day of my trial to think oh, my God, we've got to subpoena--

JUSTICE TAYLOR: Wait a minute, why wouldn't you bring a motion in limine to have the stricken information taken out and then you would know what teacher you have to call. And you know and I know you would depose them.

MR. MARTINA: I can do that now though.

JUSTICE TAYLOR: I know that, but these teachers aren't all going to be on tenderhooks out there wondering if they have to come to court. They're going to be, first of all there's going to be a motion in limine because that's cheaper than deposing people.

MR. MARTINA: And we can do that now.

JUSTICE TAYLOR: Right. And why wouldn't the expert's report be subject to that.

MR. MARTINA: And it is now. That's just it.

JUSTICE TAYLOR: And when the motion is brought, if the objections are frivolous why wouldn't a trial judge who wants to have no more of these kinds of hearings than necessary just make it the case that the party that causes the hearing to be held unnecessarily has to pay for the cost of the hearing.

MR. MARTINA: You know it's interesting. When I read the report of the proponents of this the whole thing seems to be they don't trust the discretion of jurists. I mean it's really unfortunate. I'm not a judge and I don't know if I would ever want to be but--

JUSTICE YOUNG: Let me ask the question I asked of Dr. Erard. In your experience has there been much effort placed on eliminating inappropriate hearsay in experts before cross-examination.

MR. MARTINA: Usually what ends up happening, in my experience, before you even start the trial the judge takes you in and says listen, where are we going here gentlemen. What's happening here. Well we've got this expert, we've got that expert. I'll say you know, Your Honor, -- and this is how it's happened to me, this expert has talked to some people we have no capability of getting a hold of. He's citing this witness and that witness that we have no way--they won't return my call. And the judge typically says to the other side, if Mr. Martina hasn't had an opportunity to talk to those people then you better make sure that they're here. Because we're not going to let you cite somebody that's hiding in the woods somewhere that the other side can't hear, the other side can't cross-examine. I think most judges by and large do a fine job of that. And I think by and large while there may be some hearsay that gets in, I don't think it's causing a major problem in the system. I hate to trivialize and say if it's not broken don't fix it but recall, less than 1% of all divorce cases go to trial. Where is this thing--

JUSTICE TAYLOR: That thing keeps being cited. So what. Why should the 1% that go to trial have lousy rules of evidence.

MR. MARTINA: I don't think it will, Your Honor, I don't think we have lousy rules of evidence now.

JUSTICE TAYLOR: But if the rule is bad the fact that there's 1% or 10% or 50% that go to trial doesn't seem to change it.

MR. MARTINA: Your Honor, as long as we have judges that are doing their job on the bench, and I think the vast majority of them are, I don't think the rule is bad.

JUSTICE TAYLOR: Then why do you cite this 1% figure. I don't understand the relevance of this. Mr. Victor said so few cases go to trial. What does that mean?

MR. MARTINA: The only reason I say that is, with all due respect, in the proponents' materials that I've been seeing they talk about how there is a floodgate of litigation going on, how the courts are tied up with all these experts, going on about how some of us are just using experts because we don't want to do our homework. I don't know about you but whenever I've used an expert I've always found I had to do more homework. Or we're doing it because we're avoiding malpractice claims. I don't hire an expert because--I don't think about malpractice claims. I think about trying to represent my client and if I think a case requires an expert that's why I call them. There are all of these reasons why supposedly these experts are coming.

JUSTICE YOUNG: Do you practice general civil.

MR. MARTINA: I used to. Back in the early '80s to be frank with you I did personal injury, I did criminal and everything. I've been practicing for 23 years and in '85, '86 I turned the corner, I started doing family law.

JUSTICE YOUNG: Did you use experts in civil.

MR. MARTINA: Yes I did.

JUSTICE KELLY: Your point was that the other 99% of the family law cases are going to be adversely affected by this change in Rule 703, wasn't that what you were saying to us earlier.

MR. MARTINA: Well the whole idea of the statistic was that I don't think that the system as it presently exists is causing any sort of problem with the courts having to deal with a floodgate of experts taking up the courts' time, battling over minutiae. It's not happening. But I think it will affect our cases, yes, I think it's going to be a chilling effect. I think when witnesses realize that their involvement subjects them now, now it's very rare that they are subjected to being brought before the court but when they realize that it's going to subject them to being before the court they're not going to want to get involved and when we're talking about who is going to raise a child in this world it

doesn't matter what your political persuasions are, it doesn't matter religious or anything like this. Children are sacred to all of us and the person who raises that child has a tremendous responsibility and we want the best possible person doing that. And we want the most information--

JUSTICE CORRIGAN: All right, Mr. Martina, this is a point you've made and your time is up, sir, unless there are any other questions. We thank you for appearing this morning. Mr. Longhofer, from the State Bar Civil Procedure Committee.

MR. LONGHOFER: Good morning, may it please the Court, Chief Justice Corrigan, members of the Court. I'm here as a representative of the State Bar Civil Procedure Committee. I've been a practicing litigator in the courts of Michigan for over 25 years. The chairman of our committee, Richard Bisio, has delegated me to present the strong views of the committee in opposition to adoption of either of the proposed revisions to MRE 703 and we have submitted our position in writing. I won't repeat everything that's in there but I would like to touch on the highlights. In essence our position is three-fold. First of all we do not believe that the alleged evil to be remedied by these revisions even exists under current Michigan law. Secondly we believe that the proposed revisions would represent a step backward in Michigan jurisprudence and thirdly, we believe that the proposed revisions go beyond their stated purpose and that to the extent any change should be made, it should be a narrowly tailored change such as the recent amendment to the Federal Rule of Evidence 703. First of all, as to whether there is an evil to be remedied in the first place, the reason for the proposed revisions as stated in the Staff Comment is that it is to correct a common misreading of the current rule. Namely, that it allows experts to testify about inadmissible hearsay as part of the basis of the expert's opinion. We don't believe that this reading is consistent with current law. In fact it's contrary to existing Michigan law. In the recent case of Koenig v City of South Haven the Court of Appeals affirmed the exclusion of hearsay testimony by an expert even though that hearsay testimony was part of the basis of the expert's decision. Now that's current Michigan law. The case was reversed in part by this Court but not on that point. To the extent it was affirmed it is binding on all lower courts. In fact it has never been appropriate under Michigan Rule of Evidence 703 to allow experts to testify to inadmissible hearsay when it's offered for its truth by the opponent. In cases where this error might be made it can be corrected just as any other incorrect evidentiary ruling with review by the appellate courts. I think what is needed to correct any perceived problem in practice in trials in Michigan is more diligence by trial judges in enforcing the existing evidence rule, more diligence by trial lawyers in realizing that they have this objection to be made in the first place. Secondly, we feel that it would turn back the clock on Michigan evidence law to adopt these proposals. One of the great advances of modern evidence law was to permit experts to testify on the same basis or the same data that they ordinarily rely on in their everyday practice. They make life and death decisions. They

make significant financial decisions based on data that may not be independently admissible in a court of law. This allows juries to hear reliable opinion evidence on the same basis as decisions are made in the real world.

JUSTICE YOUNG: Let me just ask the question. I think that's the real issue. Are the reliability determinations being made in practice, in your experience. Are you a civil trial lawyer?

MR. LONGHOFER: Yes I am Your Honor.

JUSTICE YOUNG: In reality, are those reliability determinations being made before the testimony is given or after.

MR. LONGHOFER: That's a multifold issue. The question is, if the expert is acting in accordance with the standards of his or her profession then the expert will be making reliable decisions based upon the data normally relied upon.

JUSTICE YOUNG: I'm asking not whether the expert is conducting--

NOTE: THERE WAS AN EQUIPMENT MALFUNCTION HERE AND PART OF THE RECORDING WAS LOST.

JUSTICE CORRIGAN: (starts mid-sentence) about it's meaning. The trial judges and lawyers of Michigan deserve better as does the public that we all seek to serve." So what we have is this huge debate about are we in an educational problem or are we in a drafting problem and this Court has before it two noted scholars who have served on the Rules of Evidence original committee who are in a big debate on the meaning of the rule. Why isn't it incumbent on this Court to change or correct the poor draftsmanship that these two original members of the Rules' committee have told us is out there.

MR. LONGHOFER: We have suggested that the federal revision could be adopted to clarify and limit

JUSTICE CORRIGAN: And that's the whole committee's provision but when you say it's an educational problem then I'm asking you where do you stand with regard to Giovan and Robinson's agreement with each other that this rule is poorly drafted and that they don't even know for 25 years what this rule means.

MR. LONGHOFER: Well Jim Robinson's position has always been starting in 1975 when he chaired the Evidence Committee, that the federal version should have been adopted and it was not. And that is his position on why the rule as it currently

exists--

JUSTICE YOUNG: But he interprets it as though we have adopted the federal rules as far as I can tell.

MR. LONGHOFER: But there is an additional sentence in the current Michigan rules that is diametrically opposite to the federal rule. It says if the expert's reliance on the underlying subject are customary to (inaudible) they may not be admitted.

JUSTICE YOUNG: Well it modifies it to some--what the court did back then is it didn't go as far as the federal rule. It said the trial court still had discretion to do what it had been doing under the common law which is to require the underlying fact be in evidence so it made a step forward to allow them to rely on facts not necessarily in evidence but allowed the trial court to retain a certain discretion in certain cases not to do that. And according to the proponents of these rule changes that has given rise to misreadings of the rule. I don't think it's necessarily the case but if the Court can clarify that in fact hearsay is not admissible for its truth by the opponent which I think Jim Robinson has said from the outset, then that would be an advance.

JUSTICE TAYLOR: Can I ask you this. With regard to the recently amended Federal Rule 703, the part that got amended says facts--I'm sort of ellipsing here--facts that are otherwise inadmissible shall not be disclosed to the jury unless the court decides that the probative value outweighs their prejudicial effect. What is that all about. Is this to say that inadmissible testimony, rank hearsay let us say, the court gets to sit down and say well let's see now, I think that's really probative. How does a judge do that. I don't know how federal judges do it but tell me about that. You must get in the federal courts a bit. This sounds like an indication to the most subjective kind of justice.

MR. LONGHOFER: Well we have to understand that what's being talked about it not offering it for its truth but offering it to explain how the expert got to the opinion. And so then

JUSTICE YOUNG: Then it's not hearsay. It's not being offered for the truth, right.

MR. LONGHOFER: That's correct.

JUSTICE TAYLOR: But the predicate is, it is hearsay. It's inadmissible. It's inadmissible, point one. Point two, you can let it in if you want to. I can't figure out how a rule like that can work.

MR. LONGHOFER: It's not independently admissible.

JUSTICE TAYLOR: It's inadmissible in the rule.

MR. LONGHOFER: It's admissible for a limited purpose.

MR. LONGHOFER: I'm not trying to quibble. It just says inadmissible in the rule. If it's inadmissible, so now let's take the most egregious case we can, something that's really wildly inadmissible. But yet the federal judge under the rule, as I read it, has the ability if he or she concludes that the appropriate value substantially outweighs the prejudicial effect, to let it in. What kind of rule is that. How would a person ever--the rule of law is to be able to anticipate what the law is and to understand what it is prospectively. How would a person who was trying a case ever know what was going to come in and what wasn't.

MR. LONGHOFER: Well it's my understanding that to the extent under the federal rule it is allowed to be disclosed to the jury, it's not necessarily being admitted into evidence, it's being allowed to be explained as the basis for the expert's opinion, but not offered for its truth.

JUSTICE YOUNG: We're talking about this area of what is reliable for a jury to be exposed to. That's what hearsay is all about. There are some things that we act on in our everyday lives that may or may not be reliable and the tests that hearsay sets up is we're only going to let the most trustworthy of these and the most reliable of these kinds of inferential kinds of judgments we make to be admitted so that the jury can consider them. And so if we allow these unreliable, untrustworthy things to come in through an expert it seems to me we're destroying laboratory conditions that all the MRE are directed to try and create. And I'm concerned--let me just state my concern and you can explain to me why MRE 703 solves this problem. Unless there is an examination as to the trustworthiness and reliability of evidence that if it were coming in in any other way but through an expert at the time the expert is prepared to offer to a jury, then aren't we really just ceding--we've blown a huge hole in our laboratory conditions on the Rules of Evidence.

MR. LONGHOFER: Well our position is that the most important thing is the restriction in the proposed rule on what an expert can rely on and we are not as troubled because we think it's existing law, with a rule that says that hearsay cannot come it and be disposed to the jury through an expert. What the Rule 703 and federal rule does is allow the trial court to make a judgment to what extent

JUSTICE YOUNG: But it says it's inadmissible so some determination has

been made that the underlying data is not admissible in and of itself and then the rule goes on to say well even though the judge gets to decide whether it's more probative or not. That's not a trustworthiness or reliability analysis. Which is the core basis for letting evidence in in the first place. So I don't understand, if you can explain why that makes sense to you and why you've recommended it to us as an alterative I would be eternally grateful to you.

MR. LONGHOFER: The reason we feel that makes sense is we're not talking about--

JUSTICE YOUNG: Facts or data that are otherwise inadmissible shall not be disclosed unless the court does this prejudicial weighing.

MR. LONGHOFER: What the federal rule is doing is not making these facts admissible. They are inadmissible. The question is are they being disclosed to the jury and that is only for the purpose of explaining what the expert based the opinion on. It's a middle ground position which allows the trial court to have discretion as to whether it should be disclosed to the jury or not but under those circumstances it renders it admissible as substantive evidence for the truth of the matters asserted. And all we're talking about is whether or not the expert gets to explain to the jury the facts the expert relied on or whether the expert cannot disclose certain of those facts.

JUSTICE YOUNG: I relied on the neighbor who said that this was a really bad guy.

MR. LONGHOFER: If that's in the expert's report and the opponent wants to bring that out, and there is nothing precluding the opponent from bringing it out on cross-examination

JUSTICE YOUNG: Ordinarily we wouldn't let that in any other way, the jury wouldn't be exposed to that opinion of the neighbor other than through an expert but the expert can get that in. And you think that's a good thing.

MR. LONGHOFER: We propose no change but if the Court feels there needs to be a change we feel that this is a compromise position.

JUSTICE YOUNG: Let me walk through the predicate issues. Do you agree with Jim Robinson's statement that the current rule, apparently, by two of the originators of our MRE being so diverse in their views of what it says, that there is a problem with the way the current rule is certainly written.

MR. LONGHOFER: I think the language of the rule is somewhat confusing.

JUSTICE YOUNG: Two, do you agree that in practice the rule is not resulting in a consistent practice of testing the reliability of the underlying data of expert opinions.

MR. LONGHOFER: No, I don't think it's the rule--

JUSTICE YOUNG: I'm talking about the practice.

MR. LONGHOFER: But it's not the rule that's resulting in the practice--

JUSTICE YOUNG: We talked about the rule in point one. Point two, in practice do you agree that the practice is not resulting in consistently testing the reliability of the underlying data of expert opinions.

MR. LONGHOFER: I would agree with that. Not consistently.

JUSTICE CORRIGAN: Mr. Longhofer your time is up sir. And we'll hear now from Ann Argiroff.

MS. ARGIROFF: I've been practicing family law and working in appeals for over 15 years now. I was on family law council for six years. I'm speaking on my behalf at this hearing and after discussing this issue with several appellate attorneys who concentrate on family law. We do not specifically oppose the change in 703 and if there is going to be a change, there be no specific exemption for family law. In custody trials--

JUSTICE TAYLOR: Which part of the revision, there's an (A) and a (B). Which part are you supporting?

MS. ARGIROFF: I was just talking about the fundamental change in terms of--in custody trials more than in other trials, the expert makes assessments that the trier of fact usually makes. The expert determines and offers opinions on the best interest factors which includes credibility determinations. In many cases the trier of fact adopts an expert's opinion or relies heavily on an expert's opinion. Experts call on witnesses, they rely on them and right now there often is no real ability to assess or analyze or verify the accuracy of the information relied on by experts. I think it is especially important in custody cases to be able to do this and these are the concerns that were raised in Malloy and brought out in the Malloy briefs about the importance of accuracy and verification of facts when it relates to a fundamental issue such as custody. Parties can always stipulate

to letting expert opinions without specifying all of the bases. They can choose alternate dispute resolution processes where there are different forms of bringing in evidence and they can allow in hearsay. For the small percentage, though, of family law cases that go to trial, these parties have not waived due process. I've heard the Family Law Council's arguments and I found them, while there may be some problems with having expensive trials and every little issue, I have not seen it that often in my appeals and I have not found their reasons compelling enough to do away with the due process considerations that are behind this proposed rule change. Someone raised the issue, I think it was Dr. Erard, raised some Malloy concerns. I think it was (inaudible) in terms of him raising Malloy concerns in terms of opposing the change to MRE 703. I think the change in MRE 703 encourages accuracy and the ability to analyze what information has gone into an expert opinion especially in custody cases where expert opinions are so important. Finally, someone said you can always ask what did you rely on in cross-examination. Well, number one that assumes an adequate opportunity to rebut which is not always available in family law cases and I have seen many times in my appeals that someone hasn't had the ability then to call a rebuttal witness or somehow rebut what was put into kind of what the expert relied on. And further, I think too that there are many--someone talked about subjectivity. The subjectivity involved in expert reports in custody cases is rampant. And this at least provides some ability to try to get at some actual bases and a way to test the actual bases for an expert opinion. So if there is going to be a rule change we feel that there should be no specific exemption for family law.

JUSTICE YOUNG: Are you talking about the changes proposed to 1101.

MS. ARGIROFF: You know what, to be honest with you, I didn't review the changes to 1101. I'm talking about the change to 703. If there is going to be the change requiring that the evidence shall be admissible and shall be revealed, then I would support that change, or at least not specifically object to it. May I ask, I'm sorry I didn't review the 1101. What was that specific change.

JUSTICE CORRIGAN: That's all right. We thank you for appearing this morning. Are there any questions for Ms. Argiroff. Thank you.

At this time I must excuse myself and Justice Cavanagh will take over here.

Item 2: 1999-50 - MCR 7.302.

JUSTICE CAVANAGH: Next item is Administrative Matter 1999-50. I've got no one listed on that matter so it is submitted.

Item 3: 2000-27 - MCR 7.205 et seq.

JUSTICE CAVANAGH: Next item is 2000-27 - MCR 7.205 et seq. and I have Sandra Girard, Prison Legal Services.

MS. GIRARD: Good morning Justice Cavanagh and Justices. My name is Sandra Girard. I'm the director of Prison Legal Services and I'm here to speak on behalf of another world, so to speak, and that is the prisoners who are incarcerated in our state prison. I would urge the Court not to reduce the time for filing an application for leave to this Court seeking review. I believe it will have a seriously disparately prejudicial impact on incarcerated persons and probably low income persons in general who tend to be represented, if they have counsel for this stage of the appellate process, by appointed or government paid attorneys who have generally overwhelming case loads and to reduce the amount of time that they may have to prepare an application would oftentimes result in them not being able to take that next step for their clients. And as this Court knows, it is discretionary with appointed counsel whether or not to prepare an application for leave to the Supreme Court. Most attorneys do not. This Court has been very gracious and has allowed *pro per* appellants to use a form application that Prison Legal Services prepared which does greatly simply the application procedure however most prisoners now have trouble meeting a 56-day deadline. To reduce it to seven weeks--I would just like to quickly run it through the steps. With prisoners who are represented at the Court of Appeals level but who are incarcerated, first the Court of Appeals decision has to get to their appellate attorney. We've seen in our mail, at least, tremendous delays since the Anthrax problem developed just in getting mail through the postal system. It often takes up to a week, 4 or 5 days to a week. Sometimes we get it the next day but we don't count on that any longer. Then that attorney has to get to his or her mail, send the opinion out to the prisoner who may or may not be at the same prison he or she was at the last time the attorney wrote to the person. There are over 70,000 transfers a year. Prisoners are frequently transferred. Then incoming mail is processed differently at prisons now since the Anthrax scare. Mailrooms are opening all the legal mail whereas before it went to another department staff person who opened legal mail. Mailrooms now have to process in a much more complicated way all outgoing mail so there's a delay in incoming mail and it would not be uncommon for it to take 4 or 5 days from the time it is mailed by the appellate attorney to get to the prisoner and sometimes it would take much longer if he or she has been transferred. I'd like to also point out to the Court just briefly who we're talking about. The average reading level for prisoners is Grade 7. The math score is Grade

6. Their language abilities which includes their ability to express their thoughts, to understand what they read and express themselves is Grade 5 and the spelling ability is Grade 6. 51% of the prison population had a history of drug abuse prior to prison; 40% had a history of alcohol abuse which often both of those result in mental, lasting cognitive problems. And 23% had a history of mental health treatment prior to prison. This is the group we're talking about trying to deal with an even shorter time period for getting an application for leave in.

JUSTICE CAVANAGH: I have to ask you to kind of wind this down.

MS. GIRARD: Yes. They have to write to get a *pro per* application form in many instances which may take another week or two. If they're going to get legal assistance from another prisoner who is able to read and write at a higher level, they have to find someone and get approval from the prison authorities before they can even get the help. That takes a minimum of 5 days. You have to wait to get law library time. Even getting photocopies is very, very time consuming and problematic. Some prisons have taken the position that anything that can be retyped or copied by hand is not eligible for photocopying. That means that the Court of Appeals decision would have to be copied out by hand or perhaps even the Court of Appeals brief that has to be attached to this *pro per* application form that is widely used by prisoners. All of that is just incredibly time consuming, especially when you're talking about people who are of a very low educational level. If you're talking about prisoners who are in segregation then all of those time lines are much longer and they don't even have direct access to law libraries. They have to write to get books. Prisoners in Level I prisons, that is the lowest security and the best behaved prisoners, also do not have direct access to law libraries. At most prisons they have to write to a higher security prison to get books. It would really make it impossible almost for many prisoners, not all of them of course, but for a great majority of prisoners, to even seek review by this Court. I think that considering the fact that for this group of people seeking leave, freedom is what is at stake, oftentimes for the rest of their life, for long periods of time, and I think that's for the individual applicants. For the system as a whole it's the integrity of the process that's at stake. When we take steps that will cut out one of the most vulnerable groups of our population.

JUSTICE MARKMAN: Would your concerns about the proposal be diminished if we were to adopt some counterpart of the mailbox rule.

MS. GIRARD: That would help a lot but it would only save approximately a week. But most of the steps--and I am very much in favor of that, I do think that would be a significant improvement, but all of the other steps that I've outlined still would have to take place. But that still would be very helpful. And if the Court did adopt that, I would hope that it would apply to all courts because all of these problems

actually apply whether this person is filing something in the trial court or the Court of Appeals.

JUSTICE CAVANAGH: Thank you Ms. Girard. Any other questions. All right that matter is submitted.

Item 4: 2001-10 - MCR 6.005, 8.123

JUSTICE CAVANAGH: Item 4, 2001-10. Proposed amendment of Rule 6.005 and proposed new rule 8.123 of MCR. Whether to require courts to adopt a counsel appointment plan that de-emphasizes the involvement of individual judges including chain of public record of all appointments and compensation. I've got listed Lauretta Murphy, State Bar Elder Law and Advocacy Section.

MS. MURPHY: Good morning. I'm attorney Laurie Murphy and I practice only in the area of probate and I'm speaking only to this rule as it applies to probate court, not as it applies to circuit or district court indigent appointments. And I'm addressing the Court on behalf of the Elder Law and Advocacy Section of the State Bar. The proposed rule requires courts, including the probate court, to provide a plan for appointment of counsel for indigent persons and further requires to keep very substantial records regarding their appointments including how much they are paid. This rule and the rule that was proposed last year were proposed at least partially in response to the Guardian (inaudible) cases that I know you're aware of due to the Supreme Court Task Force on that issue. In that case court appointed fiduciaries, not attorneys, exploited vulnerable incapacitated persons and stole their money. The Elder Law and Advocacy Section of the State Bar believes that this change in the court rule is a very positive step towards accountability for court-appointed attorneys and potentially for other court-appointed fiduciaries who represent vulnerable people. However we believe the rule does not go far enough and it is the Section's position that, like last year's proposed rule, that the rule should govern all court-appointed fiduciaries and all court-appointed attorneys, not just attorneys for indigent persons. And that would include guardians, conservators, guardian ad litems, court appointed trustees, court appointed personal representatives. We realize that the probate judges would find that this rule presents administrative difficulties for them because it's a demanding role in terms of record keeping. The probate judges are leaders in protecting the vulnerable populations that are dealt with in the probate court and we respect the fact that they are continuously being asked to do more with less. We're aware and concerned about that but we think the answer is not to make the rule less stringent. We believe that the rule is to try to make resources available so that people who are dealing with our most vulnerable populations can be accountable and so that the public can know how this type of appointment is handled.

JUSTICE YOUNG: Can I ask you, we got quite a vociferous response from the probate judges that the application of a sunshine and record keeping provisions as to the appointment of guardians and conservators was an insurmountable and costly undertaking. Do you have any basis for challenging that, as opposed to the appointment of counsel in the probate court, that the non-counsel appointment process is so difficult that it shouldn't be subject to the same rules.

MS. MURPHY: I understand that concern. I have not seen the letter or whatever you received. I am aware of that concern and sympathetic to that concern because it is an administrative hassle, but--

JUSTICE YOUNG: What is different about the appointment of conservators as to appointment of lawyers that would make it more difficult to keep track of those appointments.

MS. MURPHY: I don't think there is anything substantially different but again I certainly can't speak to the internal administration of the probate court. It is my belief that that shouldn't be a substantially different record keeping problem but I really can't speak to that internally. Any other questions.

JUSTICE CAVANAGH: Thank you Ms. Murphy. I had Judge Milton Mack on behalf of the Probate Judges Association endorsed and Judge Mack is not with us this morning. And Judge Linda Hallmark is also not present. Linda Vandenburg, Michigan Public Defense Task Force.

MS. VANDENBURG: Good morning Justice Cavanagh and Justices. I am really grateful that you're letting me speak today. Unfortunately there was a miscommunication and the Michigan Counsel (inaudible) did not advise that I would be speaking today so I really appreciate the time. We have submitted comments to the Court and I'm sure you've all read them. I have also reviewed the comments received largely, it seems, from judges in one capacity or another and I won't reiterate everything that was in the letter to the Court from the Michigan Public Defense Task Force, but I would like to emphasize that the Task Force convened in order to address (tape changed) delivery of public defense services in Michigan, the inconsistency, underfunding, the lack of independence. This rule, we support the portion of the rule that encourages independence from the judiciary in the appointment of attorneys. We feel, however, that the rule does not provide any standards for approval of the individual localized plans for appointing attorneys and does not provide a clear enough demarcation between--the mandatory nature of the independence that is referred to in the rule. And so for that reason we are requesting the Court to withhold adopting this rule until the Task Force has completed its

work. It is in the process of developing a model plan for delivery of services. It has already met with a draft of that plan and we will have that plan by the end of the year. It will address many more factors of the delivery system and it will do so in a more comprehensive manner. The fear of the Task Force is that if the Court adopts this rule with no standards for what public defense delivery system should look like at a local level and the authority of the Justices to approve such systems without reliance upon any such standards will undermine further reform efforts. It is not our goal to see this go by the wayside. We want to see some change happen in Michigan. We are concerned about the level of support and the inconsistency within the system, but we believe that (inaudible) and will be more comprehensively addressed and there is a lot of work that has gone into it to date. So that is our principle concern.

JUSTICE TAYLOR: Why wouldn't what you're group is involved with be entirely irrelevant to this appointment process.

MS. VANDENBURG: Because the appointment process involves many of the same things that the Task Force is looking at. The principles that I have referred to are the 11 principles in the (inaudible) system which have been adopted by the Michigan State Bar.

JUSTICE TAYLOR: Correct me if I'm wrong. Wouldn't this be things like a lawyer assigned to represent a defendant will do a, b, c, d and e.

MS. VANDENBURG: No. These are principles that actually address the system and not the performance of individual lawyers. And I will read to you from the report and recommendations adopted by the Bar and these are the 11 principles that they adopted. (1) The selection, funding and payment of public defense counsel is independent from the judicial process; (2) Where the caseload is sufficiently high the public defense delivery system consists of both the defender office and the active participation of the private bar. (3) Clients are screened for eligibility and defense counsel--

JUSTICE YOUNG: We have your letter here.

MS. VANDENBURG: Do you have the attachment of the 11 principles?

JUSTICE TAYLOR: Well let me ask you, all that notwithstanding, this thing as I understand it has to do with the system for appointing somebody, however qualified as you would wish them to be and with whatever assignments you would wish them to have, this just has to do with who makes that appointment. I can't see--I'm being candid with you--I can't see why we would delay for your thing. It seems to be on a different topic.

MS. VANDENBURG: This rule proposes that systems for appointing (inaudible) services, the plans will be approved but the Justices of the Supreme Court and the Task Force has in fact endorsed commissions instead of that proposal.

JUSTICE MARKMAN: Counsel, surely you're aware that to the extent we've gotten feedback from judges around the state thus far, it has been exactly opposite from what you're suggesting. I'm not saying you're right or wrong, but to the extent that we've heard from judges thus far, it has been to the extent that we're intruding upon their prerogatives more than we should already.

JUSTICE TAYLOR: One size won't fit all.

MS. VANDENBURG: We agree. And we actually have not proposed a single method. What we have proposed is a structure of systems that have standards for review. I understand that

JUSTICE YOUNG: So the actual selection of a particular attorney?

MS. VANDENBURG: The selection of attorney which is presently done by the judiciary is proposed in this rule to be separated, de-emphasize the role of judiciary. The Task Force's first principle is that it would be independent of, that is it would be done by someone else entirely.

JUSTICE YOUNG: Let me suggest a couple of responses. One, one of your principal concerns has to do with state wide funding of the appointment. That is beyond the institutional and constitutional role of this Court. To the extent that you are purporting to come up with neutral and objective criteria for developing in effect a referral list, why is that incompatible with a system that this rule contemplates that each court come up with its own plan whose primary purpose is to de-emphasize the direct role of the judge in appointing counsel. Where your criteria can be used or urged to be used in each of the court plans.

MS. VANDENBURG: We would agree if those criteria were urged to be used in each of the developed plans and if the use of those criteria were reviewed by the Chief Justice in approving such localized plans.

JUSTICE YOUNG: Do you have those criteria now?

MS. VANDENBURG: We have the criteria adopted by the 11 principles.

JUSTICE YOUNG: Those are the criteria?

MS. VANDENBURG: They have been adopted by the

JUSTICE YOUNG: Those are the criteria that you are referring to.

MS. VANDENBURG: Those are the principles.

JUSTICE YOUNG: I'm talking about the criteria for selection of attorneys.

MS. VANDENBURG: Well the criteria--we are not proposing a single method of approving counsel in any given area. We recognize the need for local control.

JUSTICE YOUNG: Let me ask you this question. Assume that the Court adopts a de-emphasized rule of some sort. Not an absolute mandate that judges not be involved in any way but that's our goal. What product does your organization have to offer anyone who conscientiously is attempting to de-emphasize the judge's role in appointments.

MS. VANDENBURG: That is what the model plan that's being developed--

JUSTICE YOUNG: Do you not currently have one?

MS. VANDENBURG: It has gone through one stage of review. It is now under revision but the Task Force has met on the proposed model plan.

JUSTICE YOUNG: When is a final product forthcoming.

MS. VANDENBURG: This fall. It's uncertain exactly when it will be done but it will be done before December and at that point the next steps on that are probable proposed legislation.

JUSTICE WEAVER: Is your Task Force under the Council of Crime and Delinquency because we didn't get any information about (inaudible)

MS. VANDENBURG: The Michigan Council for Crime and Delinquency received a Guidion Initiative Grant from the American Bar Association and they convened a task force of people from around the state. There are those of us who are

attorneys, there are people who are legislators. We have service providers for all kinds of related services necessary for indigent offenders.

JUSTICE WEAVER: So under the Council for Crime and Delinquency you got the grant as (inaudible).

MS. VANDENBURG: I actually am an attorney here in Grand Rapids. I sit on this task force.

JUSTICE WEAVER: Who got the task force going I'm trying to figure out.

MS. VANDENBURG: The Michigan Council for Crime and Delinquency received a grant from the (inaudible).

JUSTICE WEAVER: And then they appointed others to the committee like you and other people.

MS. VANDENBURG: Exactly.

JUSTICE WEAVER: How many are on this task force.

MS. VANDENBURG: Approximately 50.

JUSTICE WEAVER: And they just chose who they wanted.

MS. VANDENBURG: No actually they solicited from various groups. Actually I'm representing (inaudible).

JUSTICE WEAVER: So you got appointed by your group.

MS. VANDENBURG: Bruce Neckers asked me to serve as his representative. And the difference, and actually we do not oppose a de-emphasis of the judicial role. The difference is we don't think it goes far enough. It should be independent. And secondly we don't think that there are any standards that are recommended to local communities in evaluating how those systems should be developed. And in the absence of that we fear that it will cause more chaos and we fear that people will simply avoid the rule as was evidenced from some of the comments from some of the judges that de-emphasis had very little meaning. And--

JUSTICE CAVANAGH: Do you think the task force will come up with

standards to suggest to us.

MS. VANDENBURG: I know it will. That is what the model plan is about. But the

JUSTICE YOUNG: I'm actually interested. What date?

MS. VANDENBURG: We are at a point in time right now where our director is gone for a one month period and when she comes back it will be finalized with a final vote through (inaudible).

JUSTICE YOUNG: I would like your group to provide us with a date certain when it will have these--if you want us to consider waiting I want to know with reasonable certainty how long we're going to have to wait.

MS. VANDENBURG: December 1.

JUSTICE WEAVER: And one of the questions I have is (inaudible) say a couple of the counties that I am very familiar with and I was on the trial bench (inaudible), it would then be turned over to the county board or the county administrator and what you are concerned about is that happening, is that it? Are they more qualified to appoint (inaudible).

MS. VANDENBURG: Actually the proposal is for a local unit composed of a variety of people. The standard actually specifies the structures of commissions both statewide and locally. And all of this is, as I said, a more complicated problem and as the Justices have recognized, not all directly related to this Court's rule. And we recognize that as well. But this will effect a piece of that in a way that has a potential to interfere with a systematic change that the task force is after. And it is for that reason that we ask you to wait. And it is certainly not our intent to oppose your de-emphasis on the judicial role in appointments. We are concerned about independence, very much. We would like it to be stronger. But we have--that issue is tied to many, many other issues in the systematic revision of the provision of public defense services in Michigan.

JUSTICE CAVANAGH: Thanks Ms. Vandenburg.

<u>Item 5: 2001-12 - MCR 8.121(C)</u>

JUSTICE CAVANAGH: Item 5 is 2001-12, an amendment to MCR 8.121 dealing with structured settlements present value. I have Mr. Longhofer again.

MR. LONGHOFER: Good morning again. A somewhat less contentious issue this time. On behalf of the Civil Procedure Committee, once again we support this proposed amendment with two changes. First of all we agree that there should be a rule defining the base for computing contingent fees when there is a structured settlement and that base should be the actual cost of purchasing an annuity. But we feel that the costs will often be paid by third parties, usually an insurance company, and so the words "to the defendant" after costs we recommend that they be stricken. So the rule would simply read "the actual cost of purchasing the annuity contract instead of the actual cost to the defendant of purchasing an annuity contract." We also propose adding a sentence at the end of the rule requiring the entity that purchases the annuity contract who in most cases is not an actual party to the lawsuit, to disclose its actual costs to the court and to the parties. We recommend against alternative B which would require an independent actuarial expert to certify the cost. We do not think that it's necessary in all cases. It would add to the cost and complexity of the proceedings and that the court currently has the power to appoint such an expert in those cases where it's needed. Thank you very much.

JUSTICE CAVANAGH: Thank you Mr. Longhofer.

Item 6: 2002-07 - Family Violence Indicator

JUSTICE CAVANAGH: Item 6: 2002-07 - family violence indicator dealing with a proposed amendment to administrative order 2002-3 concerning obligations or restrictions on the disclosures from the Friend of the Court. I have nobody endorsed for speaking on that.

Item 7: 2002-14 - MCR 9.128

JUSTICE CAVANAGH: Item 7: 2002-14 - amendment of MCR 9.128, an amendment that requires disciplined lawyers to pay a greater share of the cost of operating the discipline. I see Mr. John VanBolt is present and he is available for questions. Does anybody on the Court have any inquiries.

JUSTICE MARKMAN: Thank you Mr. VanBolt. I notice that you responded to a number of comments that were submitted in various letters to this committee but I didn't see any responses to the correspondence from Mr. Mogel (sp). Have you seen that?

MR. VANBOLT: Yes I did.

JUSTICE MARKMAN: He raises a number of very interesting issues

about whether or not this proposal has the potential to undermine the integrity of the process by encouraging adverse decisions which might result in greater revenues coming into the system. I think he is particularly concerned in light of the fact that some of these changed are in direct response to the deficits that are currently being suffered by the system. Can you give me a general response to the concerns that Mr. Mogel brings.

MR. VANBOLT: I would say that I don't believe it was every the intent of the Grievance Commission and the Discipline Board in proposing this rule that this rule would in fact be a significant revenue enhancer. As the Court is aware, the current expenditures of the Board and the Commission is just somewhat under $4 million. I think Mr. Mogel's figures are essentially correct. I believe that if this rule had been in effect last year, the Discipline Board and its analysts would have assessed somewhere in the range of an additional $150,000 in costs. This is not intended to fund the system especially in view of the fact that remembering that the Grievance Commission, which is the largest part of the system, accounting for somewhere around 75-80% of the expenditures, their end product is more often than not--somewhere in the range of 90%--are investigative files that are closed. So we are not asking the disciplined attorneys to bear the cost of funding the system. What we are asking is that they bear at least some portion of the administrative costs that are incurred in the mere facts of opening the file, doing the bare minimum of investigation and processing that requires to see a case through to fruition.

JUSTICE MARKMAN: Mr. Mogel's point is that you'll be levying administrative expenses according to the proposed schedule only against those who are in fact disciplined.

MR. VANBOLT: That's correct.

JUSTICE MARKMAN: And he raises the question whether or not there (inaudible) that are introduced into the system.

MR. VANBOLT: Well it is certainly not different in kind than the card system. 9.128 currently directs the Board to assess the actual costs which are incurred and I can tell you that we have cases where the cases have gone on for a significant amount of time where the transcript costs, the subpoena costs, are in the range of $3,000-4,000.

JUSTICE MARKMAN: But you yourself say the average is considerably below $700.

MR. VANBOLT: Yes, the average is much lower than that. But to the extent, for instance, he raises the point that the Discipline Board or panel might take financial considerations into account in determining whether or not to impose discipline I

would suggest (a) I can tell you and you have to just, I guess, take this on faith, I do not believe that that has ever been a consideration but that exists now. If the Board is faced with a case which is on where the question is should there be misconduct which would probably result in a reprimand or was there no misconduct and this case has been through the system to the extent that there are $3,000 or 4,000 in costs, yes, if that is the case, as the system stands now the Board could say gee if we impose discipline we'll get $4,000. That is simply not happening. And I'm not sure this proposal significantly changes the rules. It simply allows us to recoup not just the money that we've actually spent out of our pockets but recoup some of our administrative time.

JUSTICE MARKMAN: I don't mean to be the devil's advocate but of course we don't know whether or not it's happening. It's not that we don't have people of good faith who are working in the system but we don't have a laboratory experiment in which we can determine that there have been fewer disciplines or more disciplines if the financial incentives based upon the disciplinary expenses have been more or less. We really don't know. Mr. Mogel is saying now we're introducing a considerable new financial consideration and that as a result there may be perverse incentives, not merely toward discipline, more discipline rather than less discipline, but also toward fewer consent judgments.

MR. VANBOLT: To the extent that we don't know what the consequences will be I think that's true. I think it may well be possible, the likely result I suppose would be that there would be more consent disciplines that at some point during the process the respondent and/or respondent's counsel is going to suggest that rather than carry this further and with the potential of 1,500 in costs, maybe it's better to cut the losses now and see if an agreement can be reached and pay $750 in costs. But we don't know that.

JUSTICE MARKMAN: So you would have us tell Mr. Mogel what, essentially, in response to this concerns. What is the thrust of what you would say in order assuage his reservations.

MR. VANBOLT: That the proposal is not motivated by a desire to substantially increase revenues. It is motivated by a simple desire to, exactly the same philosophy which says that if you are disciplined you pay for the transcript costs. If you're not disciplined you don't have to pay for the transcript costs. We are simply recognizing that in addition to the actual out-of-pocket expenses there are other not as well identifiable but real costs which should be borne by the person who has committed misconduct.

JUSTICE MARKMAN: Thank you Mr. VanBolt.

JUSTICE KELLY: Are these costs to your knowledge being assessed in other states with systems like ours.

MR. VANBOLT: Yes. I believe the material that we submitted, I believe there are 10 states. There is a variety. There are some which have a simple flat fee in all cases. There are several that have graduated systems of some type. There is at least one which graduates based on the level of discipline so disbarment you pay more in costs than if it was suspension. The Michigan proposal is based largely on the New Jersey experience which has roughly similar amounts and divided between consent disciplines and cases which go to trial. And again recognizing simply that both agencies spend significantly more time and effort to process a case that goes to hearing than a case that is decided by consent. But yes there are 10 states and I do apologize, I misunderstood the people from Florida to say that their schedule which I think goes up to $5,000, I believe, had been passed. In fact it is only under consideration although they expect their Supreme Court to pass that sometime in the next year.

JUSTICE CAVANAGH: Thank you Mr. VanBolt.

Item 8: 2002-16 - MCR 9.110

JUSTICE CAVANAGH: Item 8: 2002-16 - MCR 9.110 will be submitted.

Item 9: 2002-18 - MCR 703.2 et seq.

JUSTICE CAVANAGH: Item 9: 2002-18 - an amendment to MCR 7.302, whether to standardize the type size used in briefs and other papers filed with the Supreme Court. I'm amazed that there isn't a throng of people here to comment on that.

Item 10: 2002-25 - MCR 6.445 and 6.610

JUSTICE CAVANAGH: Item 10: 2002-25. We have no takers on that as well so those matters are submitted and will be considered by the Court and this public hearing will stand adjourned.